SRI BINARAYA SDN BHD

v.

GOLDEN APPROACH SDN BHD (NO 2)

HIGH COURT MALAYA, SHAH ALAM
ZULKEFLI MAKINUDIN J
[COMPANIES WINDING-UP NO: MT4-28-1-1999]
25 SEPTEMBER 2002

COMPANY LAW: *Winding-up - Stay of proceedings - Test to be applied - Distinction between application for stay of winding up proceedings and application for stay of execution of judgment - When to apply nugatory and 'special circumstances' approach - Whether winding up proceedings would entail grave and wide repercussions - Whether nugatory approach preferred*

The respondent company ("applicant") was a developer of a housing project ("the project") and had appointed Sri Binaraya ("petitioner") as the main contractor. The petitioner alleged that the applicant was indebted to it; applicant denied. Subsequently the petitioner filed a winding up petition ("the petition") against the applicant which had been granted by the court. The applicant has since filed an appeal against the winding-up order and pending the disposal of the appeal, this application was filed praying for, among others, that all proceedings and execution in relation to the winding-up order be stayed.

Held:

[1] There should be a distinction made between an application for a stay of winding-up proceedings and an application for stay of execution of judgment. A more stringent test should be applied in application for stay of execution of judgment, namely the "special circumstances'' approach. Whereas a winding up order has grave and wide repercussions on the wound-up company, its creditors, shareholders and in this case, the public as the applicant was a housing developer. Thus, a less stringent test was to be adopted in an application to stay a winding-up order, namely to apply "whether appeal would be rendered nugatory" approach.
(pp 274 h & 275 a-b)

[2] The official receiver (OR) is empowered under Companies Act 1965 to manage the project, and the OR has neither the expertise nor the resources to run the project of the following vast magnitude. In the event of the OR running the project and the high probability of the failure of the project, the main business and asset of the applicant comprising the project may be destroyed. In such a case the applicant would suffer irreparable harm and the appeal would be negative in effect. (p 275 d & f-g)

[3] The applicant was in a position to pay the sum claimed by the petitioner. If the winding-up order was not stayed, the continuation of the winding-up proceedings may permanently end the business and existence of the applicant, and the official receiver would be empowered to distribute the assets of the applicant which would cause irreparable damage. If a stay of the winding-up order is granted, the applicant is able to meet its on-going commitments to its creditors, house purchasers and shareholders. Thus based on the facts and circumstances, the court held that the appeal would be rendered nugatory if the winding up order was not stayed. (p 276 a-e)

[Application allowed.]

Case(s) referred to:

Aetna Properties Ltd (In Liq) v. GA Listing & Maintenance Pty Ltd [1994] 13 ACSR 422 ***(refd)***

Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(refd)***

Brinds Ltd & Ors v. Offshore Oil NL & Ors 10 ACLR 242 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 ***(refd)***

Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***

Penang Port Commission v. Kanawangi Seperumaniam [1997] 1 CLJ 434 ***(refd)***

See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1991] 3 CLJ 2078 ***(refd)***

Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim [1972] 2 MLJ 526 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218, 243(1)

Courts of Judicature Act 1964, ss. 43, 44(1)

For the petitioner - KY Lim (Fiona Barnaby & Dato' Mahinder Singh); M/s KY Lim Barnaby & Tan

For the respondent - ET Low; M/s Cheong Wai Meng & Van Buerle

For the applicant - Erroll Joseph; M/s Lee Hishamuddin

[The respondent has appealed to the Court of Appeal vide No: 13-02-609-02.]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin J:

Introduction

This is an application as in encl. (16) by the respondent company, Golden Approach Sdn Bhd ("applicant") to stay the winding-up order made on the

applicant by His Lordship Chin Fook Yen J on 12 June 2000 pending the disposal of the applicant's appeal to the Court of Appeal against the said winding-up order. When this application was first fixed for hearing on 6 November 2000, this court granted an interim stay pending the disposal of this application. The interim stay was subsequently extended on 17 November 2000 and 22 November 2000 until final disposal of this application. The interim stay has been granted upon the consent of the applicant and the petitioner that the applicant gave the following undertakings to this court:

(a) the applicant undertook not to dissipate any of its assets until 24 April 2001;

(b) the applicant undertook not to disburse cash from its accounts until 24 April 2001; and

(c) the applicant undertook to report to the liquidator of the applicant, the official receiver ("OR") and to furnish a copy of such a report to the petitioner's solicitors in respect of the following matters:

(i) all payments received by the applicant;

(ii) all correspondence between the applicant on the one hand and on the other hand, banks and certain public authorities;

(iii) any new litigation involving the applicant;

(iv) all liabilities incurred by the applicant;

(v) details of satisfaction of creditor of the applicant; and

(vi) details of any acquisition of assets by the applicant.

Brief Facts

The applicant was at all material times and still is the developer of a housing project known as "Diamond Creeks Country Retreat" situated at Lot Nos. 9887 and 9888, Mukim of Ulu Bernam, Daerah Tanjung Malim, Perak ("project"). In respect of the project, the applicant had appointed Sri Binaraya Sdn Bhd ("petitioner") as the main contractor in respect of two construction matters.

(i) the main access road works ("Main Access Road Work"); and

(ii) the stage 1 civil infrastructure works ("Stage 1 Work").

The petitioner alleged that the applicant was indebted to the petitioner for the sum of RM2,108,820.22 in respect of the Main Access Road Work and Stage 1 Work. By a letter dated 8 December 1998, the petitioner issued a notice under s. 218 of the Companies Act 1965 ("s. 218 notice") to the applicant

claiming a sum of RM2,108,820.22. By a letter dated 23 December 1998 the applicant replied through its solicitors and denied its indebtedness to the petitioner as alleged in the s. 218 notice. The petitioner had on 4 January 1999 filed a winding-up petition against the applicant ("petition"). By a notice of motion dated 20 May 1999 the applicant had moved this court to strike out the petition ("applicants striking-out application"). Both the petition and the applicant's striking out application were directed by this court to be heard together. After hearing submissions of both parties, His Lordship Chin Fook Yen J had on 3 May 2000 dismissed the applicant's striking-out application and subsequently on 12 June 2000 granted the said winding-up order. The applicant has since filed an appeal against the winding-up order *vide* notice of appeal dated 13 June 2000. Pending the disposal of the appeal, this application was filed praying for, among others, that all proceedings and execution in relation to the winding-up order be stayed.

Preliminary Objection

It is also necessary to state here that the petitioner has raised a preliminary objection in respect of the applicant's application in encl. (16). Learned counsel for the petitioner contended that the application in encl. (16) can only be brought under s. 243(1) of the Companies Act 1965 and only before a judge of the Court of Appeal under s. 44(1) of the Courts of Judicature Act 1964 ("The Act") based on the decision in the case of *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1991] 3 CLJ 2078. Section 44(1) of the Act states as follows:

> In any proceeding pending before the Supreme Court any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of the proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Supreme Court.

Following the creation of the Court of Appeal, the words "Supreme Court" in s. 44(1) of the Act were subsequently amended to read "Court of Appeal" by the Courts of Judicature (Amendment) Act 1994. I am of the view that the contention of the petitioner is highly misconceived on this issue. The counsel for the petitioner has extracted a passage from the *Sri Hartamas* case selectively without considering the judgment of the said case as a whole. In the *Sri Hartamas* case *(supra)* the Supreme Court then at pp. 2080-2081 has referred to a Supreme Court of Victoria Australia's case of *Brinds Ltd & Ors v. Offshore Oil NL & Ors* 10 ACLR 242 which is reproduced as follows:

> Plowman J's decision found support in the Supreme Court of Victoria, Australia (where our Companies Act 1965 came from) in *Brinds Ltd & Ors*

v. Offshore Oil NL & Ors where in the judgment of that Court the following passage appears:

> During the argument, I raised the question whether the applicant, Brinds Ltd having been in liquidation since December 1983 and throughout apparently insolvent, had any *locus standi* to make, itself this application for a stay, as distinct from on the one hand, such an application made by or with the consent of the liquidator and, on the other hand, a different application by others under Section 383 of the Code.
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> Since then the researches of the Nicholson J have discovered that ingenious counsel in 1879 raised the question and put the negative answer to the Court of Appeal in England in *Re Diamond Fuel Co* [1879] 13 Ch D 400 – see especially pp. 404-405. Nearly 100 years later, in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at pp. 1112-1113, Plowman J suggested what I think are substantial reasons for an affirmative answer and, in any event, I think this Court should proceed on the footing that the directors of Brinds Ltd have power to bring the present application in the name of the company. See also *McPherson Company Law* (2nd Ed) p 394 et seq.

For easy reference the case of *Brinds Ltd* is herein referred to whereby the court held *inter alia* at p. 242 as follows:

> (i) The court had an inherent jurisdiction to grant a stay of a winding-up order either because:
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> (a) the liquidator, being under the control of the Court, was subject to the Court's direction not to do certain acts pending an appeal if the doing of such acts would cause injustice; or
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> (b) the Court had an inherent jurisdiction to stay an order pending an appeal where a refusal of the stay would be likely to work a substantial injustice.
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> (ii) Notwithstanding having been in liquidation since December 1983, the company had *locus standi* to make an application for a stay without the need for the consent of the liquidator.

Further at p. 243 of *Brinds Ltd* case *(supra)* the court held as follows:

> In my opinion the liquidator, conducting a winding-up by this Court, is under the control of this Court, and in my opinion this Court has inherent jurisdiction to direct him not to do certain acts pending the hearing of the appeal to her Majesty in Council, if this Court should be of opinion that the doing of such acts in that interim would be calculated to work injustice. I am not at the moment speaking of the necessary procedure applicable to obtaining an order on that basis.
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> Further, quite apart from the Court's power over the liquidator in a winding-up by the Court, the weight of authority is, I think, in favour of there being

> an inherent power in this Court to stay any order, or to stay proceedings under any order, pending an appeal where the refusal of a stay would be likely to work a substantial injustice.

It is clear that based on the principles enunciated in *Brinds Ltd* case the respondent has applied for a stay under the inherent jurisdiction of the court as so stated in encl. (16). The petitioner had overlooked the fact that s. 43 of the Act provides as follows:

> Wherever application may be made either to the High Court or to the Court of Appeal it shall be made in the first instance to the High Court.

It is precisely for this reason that the respondent has filed encl. (16) under the inherent jurisdiction of the court in the High Court. In a recent decision of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 the Court of Appeal has reviewed the law as to the standing of a company which has been wound up to apply for a stay and his Lordship Gopal Sri Ram JCA in delivering of the judgment of the court at p. 254 had this to say:

> Applying these sections to a case as the present, the following conclusions result. First, that a company that has been ordered to be wound up has a right to appeal against that order. Second, that after lodging its notice of appeal, the company is entitled to apply to the Court of Appeal for the stay of the winding-up order in the ordinary way. In other words, incorporated into the right to appeal against a winding-up order is the further right to apply for all ancillary relief that is open to an appellant taking advantage of the system. **Of course, before applying to us, it is necessary for an appellant to move the High Court first. (Section 43 of the Courts of Judicature Act 1964**).
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> [Emphasis added].

It is pertinent to note that the consequence of not complying with s. 43 of the Act has been considered in a Court of Appeal decision in *Penang Port Commission v. Kanawangi Seperumaniam* [1997] 1 CLJ 434 wherein the court held *inter alia* as follows:

> Bearing in mind the rules and principles aforesaid, and the mandatoriness of s. 43 of the Courts of Judicature Act 1964 that states, "it shall be made in the first instance in the High Court", and also the sensitivity of s. 44(3) of the same Act which reads, "every order so made may be discharged or varied by the full Court", and the fact that the Respondent's application was to vacate or set aside of the orders of 3 January 1995 and 2 August 1995, this Court is of the opinion that the appellant ought to have first applied to the High Court for the said injunctions.

In the light of the judgment in *Maril-Rionebel's* case and the decision in *Brinds Ltd's* case which have been adopted by the Supreme Court in *Sri Hartamas's* case it is my considered view that the preliminary objection of the petitioner as regards to the respondent standing to apply for stay as in encl. (16) is without merit and should be dismissed.

I shall now deal with the merits of the applicant's application in encl. (16).

The Test To Be Applied In Deciding Whether To Grant A Stay Of The Winding-up Order

The test to be applied in deciding whether to grant a stay of a winding-up order has been laid down by the Court of Appeal in *See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299, wherein his Lordship Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal *inter alia* stated that an application for stay of a winding-up order would be granted if the appeal against such an order would be rendered nugatory if such a stay is not granted. It would appear that the Court of Appeal in *See Teow Guan's* case has expressly rejected the "special circumstances" test. The Court of Appeal chose to follow the decision of *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 and the decision of the Court of Appeal of New South Wales, Australia in *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42. The Court of Appeal in *Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim* [1972] 2 MLJ 526, also adopted the "Whether appeal would be rendered nugatory" approach in staying liquidation proceedings. It has to be noted that our Companies Act 1965 is based on Australian legislation. Hence, it could be seen as to the significance of Australian authorities such as *Alexander v. Cambridge Credit Corporation Ltd's* case relied on by our Court of Appeal in *See Teow Guan's* case. In *Aetna Properties Ltd (in Liq) v. GA Listing & Maintenance Pty Ltd* [1994] 13 ACSR 422, the Supreme Court of New South Wales, Australia followed *Alexander*'s case and held *inter alia* that in an application for a stay of winding-up order, the applicant does not have to find special or exceptional circumstances but does have to find some valid reason why it is appropriate to stay rather than let the law take its normal course.

I am of the view that there should be a distinction made between an application for a stay of winding-up proceedings and an application for stay of execution of judgment. In respect of application for stay of execution of judgment there is currently a conflict in Malaysian case authorities as to whether to apply the "Whether appeal would be rendered nugatory" approach or the "special circumstances" approach. The distinction made between an application for a stay of winding-up proceedings and an application for a stay of execution of judgment, in my view is justified among others on the ground that a judgment creditor should not be deprived of the fruits of judgment obtained by him. As

such a more stringent test should be applied in application for stay of execution of judgment, namely the "special circumstances" approach. Whereas a winding-up order has grave and wide repercussions on the wound-up company, its creditors, shareholders and in this case, the public as the applicant is a housing developer. Having found that there is a distinction to be made between application for a stay of winding-up proceedings and application for stay of execution of judgment, it is my view that a less stringent test is to be adopted in an application to stay a winding-up order, namely to apply "Whether appeal would be rendered nugatory" approach.

Decision Of The Court

Based on the facts and the circumstances of this case it is my finding that the appeal would be rendered nugatory if the winding-up order in this case is not stayed. This contention is supported by the following reasons:

1. The OR is empowered under the Companies Act 1965 to manage the project. In this respect, it is my view that the OR has neither the expertise nor the resources to run the project of the following vast magnitude. The project encompassed 1,700 acres of land and total sales in respect of the project has exceeded RM100 million;

2. The applicant has completed construction of more than 100 units of housing accommodation and has handed them to purchasers, The applicant is currently in the process of completing construction of another 60 units of housing accommodation;

3. Assuming that the winding-up order is not stayed and the OR is permitted to continue the project, it is feared that the project may not be completed successfully by the OR. There is no precedent of the OR running successfully, let alone complete, a housing project in this country. In the event of the OR running the project and the high probability of the failure of the project, the main business and asset of the applicant comprising of the project may be "destroyed". In such a case the applicant would suffer irreparable harm and the appeal would be negatived in effect;

4. It is to be noted that although all the cause papers of this application has been served on the OR and the OR's representative was present on all the hearing dates of the winding-up proceedings as well as the hearing dates of this application, the OR has not filed any affidavit to oppose this application. Nor has the OR affirmed any affidavit asserting that the OR is in a position to run and to complete the project successfully. It is also important to note that when this application was heard before this court on 6 November 2000, 17 November 2000 and 22 November 2000, the OR has not objected at all to this application;

5. If there is no stay of the winding-up order, the OR is also empowered to distribute the assets of the applicant. In such an event, the applicant would also suffer irreparable damage even if the appeal is subsequently allowed;

6. If a stay of the winding-up order is granted, the applicant is able to meet its on-going commitments to its creditors, house purchasers and shareholders;

7. The applicant is a wholly-owned subsidiary company of Poly Glass Fibre (M) Bhd ("PGFB"), a company listed on the Kuala Lumpur Stock Exchange ("KLSE"). If the winding-up order is not stayed, this would adversely affect PGFB and its shareholders in a manner which cannot be compensated in monetary terms; and

8. The applicant has a "net tangible assets" which far exceeds the sum claimed by the petitioner in the s. 218 notice. In other words, the applicant is in a position to pay the sum claimed by the petitioner in the s. 218 notice. If the winding-up order is not stayed, the continuation of the winding-up proceedings may permanently end the business and existence of the applicant.

For the above stated reasons I hereby allow the applicant's application in encl. (16) and the costs of this application shall be costs in the cause.